103

Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

MICHAEL ZONE – PETITIONER

V.

UNITED STATES OF AMERICA – RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES ELEVENTH CIRCUIT
COURT OF APPEAL

PETITION FOR WRIT OF CERTIORARI

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August 11, 2008

QUESTIONS PRESENTED

SHOULD INEFFECTIVE ASSISTANCE OF COUNSEL BE PRESUMED WHERE AN APPOINTED COUNSEL EXTORTS UNREPORTED FUNDS FROM HIS CLIENT BY TELLING HIM THE QUALITY OF HIS REPRESENTATION WOULD BE BETTER IF HE WERE TO PAY HIM, AND WHERE, IN FACT, PAYMENT OF A SUBSTANTIAL AMOUNT OF MONEY IS RAISED BY FRIENDS TO PAY THIS APPOINTED ATTORNEY?

SHOULD THE TRIAL COURT CONDUCT AN EVIDENTIARY HEARING ON AN INEFFECTIVE ASSISTANCE OF COUNSEL CLAIM IN THIS CIRCUMSTANCE PRIOR TO MAKING FACTUAL FINDINGS ADVERSE TO THE DEFENDANT ABOUT THE EFFECTIVENESS OF COUNSEL'S REPRESENTATION, AND SPECIFICALLY SHOULD THAT INQUIRY ALLOW FOR DIRECT QUESTIONING

DO ANY OF THE EXISTING DECISIONS ON INEFFECTIVE ASSISTANCE OF COUNSEL CREATE A WORKABLE FRAMEWORK FOR ANALYZING A SITUATION WHERE AN APPOINTED COUNSEL IS EXTORTING MONEY FROM HIS CLIENT?

LIST OF PARTIES AND CORPORTATE DISCLOSURE STATEMENT (Rule 29.6)

1. Robert R. Berry, district court and appellate counsel for Zone

2. Gregory W. Eisenmenger, district court and appellate counsel for Zone

3. Daniel W. Eckhart, Assistant United States Attorney

4. Beverly Williams , Assistant United States Attorney

5. Michael Zone, Defendant-Appellant

6. Robert E. O'Neill, United States Attorney

7. The Honorable Anne C. Conway, United States District Judge

TABLE OF CONTENTS

QUESTION PRESENTED.....(i)

LIST OF PARTIES AND CORPORATE DISCLOSURE STATEMENT (Rule 29.6).....(ii)

TABLE OF CONTENTS.....(iii)

INDEX TO APPENDICES.....(iii,iv)

TABLE OF AUTHORITIES CITED.....(v)

OPINIONS BELOW.....1

JURISDICTION.....2

CONSTITUTIONAL AND STATUTORY PROVISION INVOLVED.....3,4

STATEMENT OF THE CASE.....5-13

REASONS FOR GRANTING THE WRIT.....14-16

CONCLUSION.....17

INDEX TO APPENDICES

APPENDIX A

MOTION FOR POST-CONVICTION RELIEF 28 U.S.C. § 2255.....pages 18-36

APPENDIX B

ORDER ON MOTION FOR POST-CONVICTION RELIEF 28 U.S.C. § 2255 .....pages 37-51

APPENDIX C

APPLICATION FOR CERTIFICATE OF APPEALABILITY.....pages 52-59

APPENDIX D

ORDER ON APPEALABILITY.....pages 60-61

APPENDIX E

APPELLANT'S APPLICATION FOR CERTIFICATE OF APPEALABILITY.....pages 62-79

APPENDIX F

ORDER FROM UNITED STATES COURT 11TH CIRCUIT ON APPEALABILITY ...page 80

TABLE OF AUTHORITIES CITED

CASES: PAGES

Barefoot v. Estelle, 463 U.S. 880, 893, 103 S.Ct. 3383, 3394, 77 L.Ed.2d 1090 (1983) 15

Cuyler v. Sullivan, 446 U.S. 335, 100 S.Ct. 1708, 64 L.Ed.2d 333 (1980).....16

Mickens v. Taylor, 535 U.S. 162, 15 176 (2002)....15-16

STATUTES AND RULES

28 U.S.C. 2254.....2

28 U.S.C. 2255.....5,11,12,14,15

IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

The Petitioner, Michael Zone, prays that a writ of certiorari issue to review the judgment below:

The decision of the United States Court of Appeals for the Eleventh Circuit in case number 08-11124-E appears in Appendix A to the Petition and is unpublished in the Federal Reporter.

JURISDICTION

The date on which the United States Court of appeals affirmed the Petitioner's conviction was May 14, 2008. The Eleventh Circuit case number was 08-11124-E. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Amendment V, United States Constitution:

"No persons shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for thee same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any crimknal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

Amendment VI, United States Constitution

" In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall

have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense."

STATEMENT OF THE CASE

Mr. Zone was convicted in the Middle District of Florida in case number 6:06-cr-197-Orl-22KRS and was sentenced to life in prison, and sought relief under 28 U.S.C. 2255. On October 25, 2006, the Defendant was indicted on a charge of possession with intent to distribute and distribute 50 grams or more of cocaine base. On November 8, 2006, the Defendant was arrested on this indictment. On November 8, 2006, the Defendant was found to be indigent and was appointed a federal public defender. On December 4, 2006, the public defender's office was withdrawn as counsel for the Defendant. On December 4, 2006, the Court appointed attorney Charles L. Handlin III as counsel for the Defendant.

Thereafter, attorney Handlin solicited funds from the Defendant and friends to pay for his services. Mr. Handlin led Mr. Zone to believe the quality of his representation would suffer because the Court does not

adequately remunerate appointed attorneys for their work. Based on this, and his fear of an inadequate defense against very serious charges, Mr. Zone set about attempting to meet Mr. Handlin's financial demands.

The Middle District of Florida has specific instructions and requirements with regard to payment of appointed counsel. The "Instructions for Completion of the CJA Form 20 Appointment of and Authority to Pay Court Appointed Counsel" states, at page 2, "[n]o appointed attorney shall accept a payment from or on behalf of the person represented without authorization by a United States district or circuit judge or magistrate on a CJA Form 7, Order Terminating Appointment of Counsel and/or Authorization for Distribution of Available Private Funds..."

Mr. Handlin accepted a 2001 Jaguar Automobile from Mitzi Canard, a friend of the Defendant, as partial payment for a fee for his representation of Mr.

Zone on or about December 19, 2006, and also accepted $150.00 from Mr. Zone towards what apparently was to be a $25,000.00 fee for legal representation on or about January 4, 2007.

Prior to accepting these payments, Mr. Handlin did not seek authorization from the Court as is required by local rule, and no order terminating his appointment as counsel was issued. Counsel verified this by having his office contact Joan Calcutt at the Federal Courthouse in Orlando. It was also verified by a review of the clerk's on-line docket in this case. It appears from the record in this case Mr. Handlin never informed the Court of his receipt of legal fees in this case until the undersigned advised the Court of the situation. Mr. Handlin has since admitted he failed to follow the procedures outlined above.

A review of the vehicle registration records showed Mr. Handlin, and Jane Culver Handlin, are the

owners and registrants of the 2001 Jaguar formerly belonging to Ms. Canard.

Mr. Handlin falsely represented himself to the court and the jury at the beginning of Mr. Zone's trial as "appointed counsel." (criminal case Doc. 56, page 6). By maintaining this ruse, the trial Court would not become aware of Mr. Handlin's other, improper, financial arrangements regarding the Defendant. Mr. Zone was convicted at trial. The trial centered on an alleged sale of cocaine by Mr. Zone to a confidential source. There was no recording of this alleged transaction. Mr. Zone presented alibi witnesses to testify he was somewhere else at the time of the alleged transaction.

On April 5, 2007, the undersigned filed a document titled "Amicus Filing on Behalf of Defendant Michael Zone. (criminal case Doc. 48).

On April 11, 2007, the trial court ordered Mr. Handlin discharged as counsel for the Defendant. (criminal case Doc. 54, page 3).

In reviewing the trial transcript in this case, Mr. Handlin failed to object when the Government:

a) Vouched for the credibility of its witnesses (criminal case Doc. 56, Page 53, 73)

b) Characterized the Defendant as a low to mid-level drug dealer. (criminal case Doc.57, page 66, 88).

c) Outlined its reasons for targeting Mr. Zone for investigation (i.e. his past drug dealings). (criminal case Doc. 56, page 52)

d) Suggested their confidential informant was potentially in physical danger while in Mr. Zone's presence. (criminal case Doc. 56, page 58).

Attorney Handlin did not object to these assertions by the Government.

It was the Defendant's position in his 2255 motion he is entitled to a new trial based on Mr. Handlin's financial dealings with Mr. Zone. It was further Mr. Zone's position he was entitled to a new trial based on the un-objected to comments outlined in paragraph 15.

Zone filed a motion for post-conviction relief challenging the judgment and sentence entered against the Defendant on August 23, 2007 in the Middle District of Florida, Orlando Division.

The Defendant did not appeal the judgment and sentence, but instead filed his motion for post-conviction relief immediately after his sentence was entered. The reasons for this decision are as follows:

a) The trial attorney, Charles Handlin, did not file a timely motion for new trial, and therefore no issues were preserved for appellate review.

b) The trial attorney, Charles Handlin, did not object to issues discussed later in this motion,

and therefore did not preserve them for appellate review.

c) The undersigned filed a motion for new trial addressing the issue of whether the Defendant had conflict free counsel at trial based on the improper financial dealings of his attorney, Charles Handlin III. Judge Conway denied the motion as untimely finding it a) was not filed by then attorney Handlin within seven (7) days of the verdict as required by Fed. R. Crim. P. 33 and b) the motion was not based on "newly discovered evidence" as contemplated by that rule, and therefore was not exempt from the seven day requirement. The Court indicated the appropriate avenue to litigate this issue was 28 U.S.C. 2255.[1] The Defendant was sufficiently confident in Judge

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[1] Oddly, in her order denying 2255 relief, Judge Conway questioned why Mr. Zone chose to pursue 2255 relief before taking his case through the normal appellate channels. (See 2255 case Doc 7 at page 2 fn.2). It was Judge Conway herself who stated 2255 relief was the proper avenue. (See criminal case, Doc. 63, pages 6-7).

Conway's analysis of Rule 33 that he chose not to litigate whether the issues outlined below could be addressed via a motion for new trial filed outside the seven day period. Judicial economy and the Defendant's desire to resolve this matter lead him to 28 U.S.C. 2255 as the most efficient way to address the issues he wishes to litigate.

Although Mr. Zone requested an evidentiary hearing, no such hearing was held.

On February 27, 2008, the trial court issued an order denying Mr. Zone's habeas corpus petition. (2255 case Doc. 7). While finding there was "an actual conflict" and characterizing Mr. Zone's trial counsel's conduct as "clearly reprehensible and highly unethical," the Court found Mr. Zone failed to demonstrate a connection between the reprehensible and highly unethical conduct and the deficiencies alleged in his counsel's performance at trial.

The Petitioner sought a certificate of appealability form Judge Conway and from the Eleventh Circuit, but in both instances was denied that certification. This timely petition follows.

REASONS FOR GRANTING THE PETITION

It is the Petitioner's position there are essentially three (3) issues emanating out of this case. First, the issue of whether Mr. Zone's trial counsel's "clearly reprehensible and highly unethical" conduct towards Mr. Zone is in and of itself sufficient cause to grant relief. Second, the issue of whether the failure to make the objections at trial complained of in the 2255 motion form a basis for relief under that statute independent of any conflict. Third, whether there is (or has to be) a nexus between the unethical conduct of trial counsel and the failure to make objections at trial. This third issue especially merits further examination by the Courts. In the instant case, the errors complained of in trial counsel's performance are errors of omission (i.e., trial counsel failed to object to certain comments, failed to file a motion for new trial, etc.). It is the Petitioner's position these failures, whether they

were the result of a conflict of interest or sheer incompetence, merit relief under 2255.

In *Barefoot v. Estelle, 463 U.S. 880, 893, 103 S.Ct. 3383, 3394, 77 L.Ed.2d 1090 (1983)*, this Court noted the following statement "cogently sums up this standard";

> "In requiring a 'question of some substance', or a 'substantial showing of the denial of [a] federal right', obviously the petitioner need not show that he should prevail on the merits. He has already failed in that endeavor. Rather, he must demonstrate that the issues are debatable among jurists of reason; that a court could resolve the issues [in a different manner]; or that the questions are 'adequate to deserve encouragement to proceed further.' "

Id., n. 4. The issues outlined above by the Petitioner are questions of substance that go to the heart of the appropriate relationship between an attorney and his or her client. The law is unresolved as it relates to the analysis of these issues as noted by this Court in *Mickens v. Taylor, 535 U.S. 162, 15 176*

in the application of the holding in Cuyler v. Sullivan, 446 U.S. 335, 100 S.Ct. 1708, 64 L.Ed.2d 333 (1980). Under the lower court's interpretation of the current status of the law, if Mr. Zone's trial counsel had been having an affair with Mr. Zone's wife (hypothetically, as Mr. Zone is unmarried), and lost his case at trial, Mr. Zone would have no remedy unless he could show, without the benefit of an evidentiary hearing, that his attorney's decision making process at trial was affected by his conduct with Mr. Zone's wife. Dickens' Mr. Bumble would most certainly be amused.

CONCLUSION

The Petitioner prays this Court grant his petition and review his conviction.

Respectfully submitted,

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APPENDIX A

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

Case Number 6:06-cr-198-Orl-22KRS

UNITED STATES OF AMERICA

v.

MICHAEL ZONE

_____/

MOTION FOR POST-CONVICTION RELIEF
28 U.S.C. 2255

COMES NOW, the Defendant, **MICHAEL ZONE,** by and through his undersigned attorneys, and moves this Honorable Court for a new trial in the above referenced case, pursuant to 28 U.S.C. 2255.

As grounds therefore, the Defendant would show:

1. This is a motion for post-conviction relief challenging the judgment and sentence entered against the Defendant on August 23, 2007 in the Middle District of Florida, Orlando Division. The criminal docket number is 6:06-cr-198-Orl-22KRS

2. The Defendant was sentenced to a term of life in prison as a result of his conviction.

3. The Defendant was indicted for and convicted of a violation of 18 U.S.C. 841.

4. The Defendant pled not guilty to this charge and was tried by jury on January 16, and 17, 2007.

5. The Defendant did not testify at trial.

6. The Defendant did not appeal the judgment and sentence, but instead filed this motion for post-conviction relief immediately after his sentence was entered. The reasons for this decision are as follows:

a) The trial attorney, Charles Handlin, did not file a timely motion for new trial, and therefore no issues were preserved for appellate review.

b) The trial attorney, Charles Handlin, did not object to issues discussed later in this motion, and therefore did not preserve them for appellate review.

c) The undersigned filed a motion for new trial addressing the issue of whether the Defendant had

conflict free counsel at trial based on the improper financial dealings of his attorney, Charles Handlin III. Judge Conway denied the motion as untimely finding it a) was not filed within seven (7) days of the verdict as required by Fed. R. Crim. P. 33 and b) the motion was not based on "newly discovered evidence" as contemplated by that rule, and therefore was not exempt from the seven day requirement. The Court indicated the appropriate avenue to litigate this issue was 28 U.S.C. 2255. The Defendant is sufficiently confident in the Court's analysis of Rule 33 that he chooses not to litigate whether the issues outlined below could be addressed via a motion for new trial filed outside the seven day period. Judicial economy and the Defendant's desire to resolve this matter lead him to 28 U.S.C. 2255 as the most efficient way to address the issues he wishes to litigate.

GROUNDS FOR RELIEF

THE DEFENDANT WAS DENIED CONFLICT FREE COUNSEL AND EFFECTIVE ASSISTANCE OF COUNSEL.

1. On October 25, 2006, the Defendant was indicted on a charge of possession with intent to distribute and distribute 50 grams or more of cocaine base.

2. On November 8, 2006, the Defendant was arrested on this indictment.

3. On November 8, 2006, the Defendant was found to be indigent and was appointed a federal public defender.

4. On December 4, 2006, the public defender's office was withdrawn as counsel for the Defendant.

5. On December 4, 2006, the Court appointed attorney Charles L. Handlin III as counsel for the Defendant.

6. Thereafter, attorney Handlin solicited funds from the Defendant and friends to pay for his services. Mr. Handlin led Mr. Zone to believe the quality of his representation would suffer because the Court does not adequately remunerate appointed attorneys for their work. Based on this, and his fear of an inadequate defense against very serious charges, Mr. Zone set about attempting to meet Mr. Handlin's financial demands.

7. The Middle District of Florida has specific instructions and requirements with regard to payment of appointed counsel. The "Instructions for Completion of the CJA Form 20 Appointment of and Authority to Pay Court Appointed Counsel" states, at page 2, "[n]o appointed attorney shall accept a payment from or on behalf of the person represented without authorization by a United States district or circuit judge or magistrate on a CJA Form 7, Order Terminating

Appointment of Counsel and/or Authorization for Distribution of Available Private Funds..."

8. Mr. Handlin accepted a 2001 Jaguar Automobile from Mitzi Canard, a friend of the Defendant, as partial payment for a fee for his representation of Mr. Zone on or about December 19, 2006, and also accepted $150.00 from Mr. Zone towards what apparently was to be a $25,000.00 fee for legal representation on or about January 4, 2007. .

9. Prior to accepting these payments, Mr. Handlin did not seek authorization from the Court as is required by local rule, and no order terminating his appointment as counsel was issued. Counsel verified this by having his office contact Joan Calcutt at the Federal Courthouse in Orlando. It was also verified by a review of the clerk's on-line docket in this case. It appears from the record in this case Mr. Handlin never informed the Court of his receipt of legal fees in this case until the undersigned advised this Court of the

situation. Mr. Handlin has since admitted he failed to follow the procedures outlined above. (Doc 50, page 2).

10. A review of the vehicle registration records indicates Mr. Handlin, and Jane Culver Handlin, are the owners and registrants of the 2001 Jaguar formerly belonging to Ms. Canard.

11. Mr. Handlin falsely represented himself to the court and the jury at the beginning of Mr. Zone's trial as "appointed counsel." (Doc. 56, page 6). It is believed this representation was made so this Court would not become aware of Mr. Handlin's other, improper, financial arrangements regarding the Defendant. Mr. Zone was convicted at trial. The trial centered on an alleged sale of cocaine by Mr. Zone to a confidential source. There was no recording of this alleged transaction. Mr. Zone presented alibi witnesses to testify he was somewhere else at the time of the alleged transaction.

12. On April 5, 2007, the undersigned filed a document titled "Amicus Filing on Behalf of Defendant Michael Zone. (Doc. 48).

13. On April 11, 2007, this Court ordered Mr. Handlin discharged as counsel for the Defendant. (Doc. 54, page 3).

14. In reviewing the trial transcript in this case, Mr. Handlin failed to object when the Government:

a) Vouched for the credibility of its witnesses (Doc. 56, Page 53, 73)

b) Characterized the Defendant as a low to mid-level drug dealer. (Doc.57, page 66, 88).

c) Outlined its reasons for targeting Mr. Zone for investigation (i.e. his past drug dealings)[2]. (Doc. 56, page 52)

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[2] For the Government to have lawfully attempted to present this type of evidence compliance with Federal Rule of Evidence 404 is required. That 404(b) states:
"**(b) Other Crimes, Wrongs, or Acts.**--Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of

d) Suggested their confidential informant was potentially in physical danger while in Mr. Zone's presence. (Doc. 56, page 58).

Attorney Handlin did not object to these assertions by the Government. These errors

15. It is the Defendant's position he is entitled to a new trial based on Mr. Handlin's financial dealings with Mr. Zone. It would further be Mr. Zone's position he is entitled to a new trial based on the un-objected to comments outlined in paragraph 14 of this motion.

WHEREFORE, the Defendant prays this Honorable court grant him a new trial.

MEMORANDUM OF LAW

16. The Defendant would begin with the position he is simply, as a matter of law, entitled to a

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mistake or accident, provided that upon request by the accused, the prosecution in a criminal case shall provide reasonable notice in advance of trial, or during trial if the court excuses pretrial notice on good cause shown, of the general nature of any such evidence it intends to introduce at trial."

16. The Defendant would begin with the position he is simply, as a matter of law, entitled to a new trial based on Mr. Handlin's conduct. The United States Supreme Court, in Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed. 2d 674 (1984), stated:

> "Representation of a criminal defendant entails certain basic duties. Counsel's function is to assist the defendant, and hence counsel owes the client a duty of loyalty, a duty to avoid conflicts of interest. [citations omitted]."

466 .U.S. at 688. The Court went on to state:

> "One type of actual ineffectiveness claim warrants a similar, though more limited, presumption of prejudice. In *Cuyler v. Sullivan, 466 U.S. at 345-350, 100 S.Ct. at 1716-1719*, the Court held that prejudice is presumed when counsel is burdened by an actual conflict of interest. In those circumstances, counsel breaches the duty of loyalty, perhaps the most basic of counsel's duties. Moreover, it is difficult to measure the precise effect on the defense of representation corrupted by conflicting interests.

Here, the previous defense attorney was to be paid by the Government at the end of the case, but instead

negotiated an agreement with the Defendant for a $25,000.00 fee that was not paid by the Defendant at the time of trial. Mr. Handlin noted to this Court the Government was not billed for any costs or fees associated with this case." (Doc. 50, page 2). This assertion is meaningless, since under the local rules, Mr. Handlin would not be permitted to bill the government until the case concluded. The fact pattern here leads to the inescapable conclusion Mr. Handlin would have attempted to collect additional fees from the Court based on his appointment by the Court as counsel for the Defendant. Mr. Handlin, in his response to the Court regarding his fee issues with the Defendant, stated:

> "On or about December 19, 2006 Defendant arrived at the undersigned 's office with a 1991 Jaguar which had a bluebook value of approximately $7000.00 and a trade-in value of $4,000.00. The motor vehicle presently sits in the garage with a hearing problem. Additionally, Mr. Zone paid $150.00 in January of 2007. No other assets or money was received from Mr. Zone."

(Doc. 50, page 2). Contrary to counsel's representation, the vehicle he accepted was a 2001, not a 1991 Jaguar. Moreover, there are notations on the documents filed by the undersigned on April 9, 2007 (Doc. 51) indicating an intent to charge a $25,000.00 fee and crediting the 2001 Jaguar at $17,000.00.

All of this goes to the issue of Mr. Handlin's loyalty to his client. One could reasonably conclude from these facts Mr. Handlin was attempting to create two revenue streams in this case: one from the Court and one from Mr. Zone and his friends. There was no logical reason for Mr. Zone to pay Mr. Handlin anything, since compensation for his service was already taken care of. Therefore Mr. Handlin's explanation of his conduct makes no logical sense. It is more logical to believe either a) the "two revenue stream" scenario, or b) the "you'll get better representation if you pay me more than the Government will" theory. It appears he anticipated a

much larger fee from Mr. Zone than he would have received as appointed counsel given the notations on the documents supplied in Doc. 51. Under either scenario, Mr. Handlin's representation of Mr. Zone could have been compromised by the failure of Mr. Zone to live up to the side agreement negotiated by Mr. Handlin. Thus, the above described deficiencies in Mr. Handlin's performance at trial become evidence of actual prejudice to the Defendant. Mr. Zone cannot have any confidence he received a full and vigorous defense under these circumstances.

17. Florida Bar Rule 4-1.8 states:

> Rule 4-1.8. Conflict of Interest; Prohibited and Other Transactions
> (a) Business Transactions With or Acquiring Interest Adverse to Client. A lawyer shall not enter into a business transaction with a client or knowingly acquire an ownership, possessory, security, or other pecuniary interest adverse to a client, except a lien granted by law to secure a lawyer's fee or expenses, unless:
> (1) the transaction and terms on which the lawyer acquires the interest are fair and reasonable to the client and are fully

> disclosed and transmitted in writing to the client in a manner that can be reasonably understood by the client;
> (2) the client is advised in writing of the desirability of seeking and is given a reasonable opportunity to seek the advice of independent legal counsel on the transaction; and
> (3) the client gives informed consent, in a writing signed by the client, to the essential terms of the transaction and the lawyer's role in the transaction, including whether the lawyer is representing the client in the transaction.

Mr. Handlin's conduct is inconsistent with this rule. He should have explained in writing to his client and advised him as required by the rule. The *Strickland* court discussed the duty of loyalty to the client. Mr. Handlin's conduct is inconsistent with that duty and constitutes a basis to presume prejudice to the Defendant.

18. This issue aside, the Defendant was denied a fair trial by Mr. Hanlin's failure to object to improper comments by the Government and its witnesses. For example, Mr. Eckhart states in his opening that Agent Kessell will vouch for the reliability of the confidential

informant. (Doc. 56, page 53). In *United States v. Arias-Izquierdo, 449 F.3d 1168 (11th Cir. 2006)*, stated the standard to be applied is

> In reviewing a claim of prosecutorial misconduct, we must assess (1) whether the challenged comments were improper, and (2) if so, whether they prejudicially affected the substantial rights of the defendant. See United States v. Castro, 89 F.3d 1443, 1450 (11th Cir.1996). When reviewing a defendant's "vouching" claim, we examine whether (1) the prosecutor placed the prestige of the government behind the witness by making explicit personal assurances of the witness's credibility, or (2) the prosecutor implicitly vouched for the witness's credibility by *1178 implying that evidence not formally presented to the jury supports the witness's testimony. United States v. Cano, 289 F.3d 1354, 1365 (11th Cir.2002); Castro, 89 F.3d at 1457.

In addition to vouching for the CI's credibility, they argued evidence not before the jury when they characterized the Defendant as a low to middle level drug dealer. (Doc.57, page 66, 88). There was no evidence presented at trial supporting this proposition, and the Government would not have been permitted to

present such testimony under any scenario the Defendant can conceive of. Likewise, the comments about the safety of the confidential informant and the suggestion there were prior actions by Mr. Zone that led to the Government's interest in him had no relevancy in this case. *See Rule 404(b), Federal Rules of Evidence.* Mr. Handlin's failure to object to these arguments of the Government and to object to evidence supporting these arguments prejudiced the Defendant in a trial where the battleground should have been over what happened on a specific date, rather than about innuendo suggesting nefarious activity on other occasions. It should be noted that the Defendant's prior criminal history regarding drugs involve allegations of possession only, not sale or trafficking. (Doc. 30). The parties agreed at the beginning of the trial not to present evidence of prior felony drug convictions until the Defendant presented his case. (Doc. 56, page 4). It makes no sense then for the Government to then assert

in argument classifying the level of drug dealer Mr. Zone allegedly was when such a classification suggests knowledge of the nature of his activities on occasions other than that alleged in the indictment. An attorney focused on providing a vigorous defense to the Defendant as opposed to concerning himself with a) whether he has been adequately compensated for his services, and b) whether this Court will find out he has misrepresented his status as appointed counsel directly to the jury and indirectly to this Court would have made the appropriate objections at the appropriate times. There is absolutely no strategic reason for trial counsel to allow these comments to go un-objected to.

I declare under penalty of perjury that the foregoing is true and correct. Executed on August 23, 2007. **/s/ Michael Zone**

MICHAEL ZONE
Defendant

WHEREFORE, the Defendant moves this Honorable Court grant him a new trial in the above styled action.

RESPECTFULLY SUBMITTED

S/Gregory W. Eisenmenger
GREGORY W. EISENMENGER
Fla. Bar Number 237175

S/ Robert R. Berry
ROBERT R. BERRY
Fla. Bar Number 714216

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a correct and true copy of the foregoing has been sent by hand on this 23rd day of August, 2007 to: Daniel W. Eckhart, United States Attorney's Office, Middle District of Florida, 501 W. Church Street, Suite 300, Orlando, Florida 32805.

EISENMENGER, BERRY & PETERS, P.A.

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APPENDEX B

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

Case No. 6:07-cv-1331-Orl-22KRS
(6:06-cr-198-Orl-22KRS)

MICHAEL ZONE

Petitioner,

v.
UNITED STATES OF AMERICA,

Respondent.

ORDER

This case involves a motion to vacate, set aside, or correct an illegal sentence pursuant to 28 U.S.C. § 2255, filed by Michael Zone (Doc. 1). The Government filed a response (Doc.4) to the section 2255 motion in compliance with this Court's instructions and with *The Rules Governing Section 2255 Cases in the United States District Courts*. Petitioner filed a reply (Doc. 6) to the Government's response.

I. Procedural History

On October 25, 2006, a federal grand jury indicted Petitioner on one charge of knowingly and

intentionally possessing with the intent to distribute, and distribution of, 50 grams or more of "crack" cocaine, in violation of Title 21, United States Code, Sections 841(a)(1) and (b)(1)(A)(iii) (Criminal Case No. 6:06-cr-198-Orl-22KRS, Doc. 1). After a two-day jury trial, Petitioner was found guilty of the charge contained in the indictment. *See*Criminal Case Doc. 42. Petitioner filed a motion for new trial, *see* Criminal Case Doc. 59, which the Court denied as untimely, as it was filed approximately four months following the jury verdict and was not based on "newly discovered evidence," *see* Criminal Case Doc. 63. A sentencing hearing was conducted on August 23, 2007, and Petitioner was ultimately sentenced to a life term of imprisonment (Criminal Case Doc. 71). Petitioner did not directly appeal his conviction or sentence, and instead filed the instant motion to vacate.2

II. Petitioner's Claim: Ineffective Assistance of Counsel

Petitioner alleges a single claim for relief in this section 2255 motion: that he was denied effective assistance of counsel at trial because his court-appointed attorney was encumbered by a personal conflict of interest. Specifically, Petitioner maintains that his trial attorney demanded a fee from Petitioner in the amount of $25,000, and then failed to seek authorization from the Court to receive private funds from Petitioner. Petitioner contends that trial counsel's unethical motive in this instance was to supplement the compensation he was to receive from the Government for his appointment. In addition, Petitioner claims that his trial attorney "led [him] to believe the quality of his representation would suffer," Doc. 1 at 3, if he did not pay the requested fee, and, although Petitioner was able to satisfy $17,500 of the $25,000 fee by the trial date, his attorney's representation might have been compromised by his failure to satisfy the full amount of the fee.

There is no indication why Petitioner's new counsel chose not to raise the underlying issues, i.e., conflict of interest, on direct appeal. Nonetheless, counsel's decision to immediately pursue a section 2255 action, while somewhat unconventional, is not procedurally improper.

A. Legal Standard

The United States Supreme Court in *Strickland v. Washington*, 466 U.S. 668 (1984), established a two part test for determining whether a convicted person is entitled to relief on the ground that his counsel rendered ineffective assistance: (1) whether counsel's performance was deficient and "fell below an objective standard of reasonableness"; and (2) whether the deficient performance prejudiced the defense.3 *Id.* at 687-88. A court must adhere to a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance. *Id.* at 689-90. "Thus, a court deciding an actual ineffectiveness claim

must judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct." *Id.* at 690; *Gates v. Zant*, 863 F.2d 1492, 1497 (11th Cir.), *cert. denied*, 493 U.S. 945 (1989).

The Supreme Court has recognized exceptions to the general rule of *Strickland*. For instance, prejudice has been presumed in extreme cases, such as when a defendant has been denied the assistance of any counsel. *U.S. v. Cronic*, 466 U.S. 648, 658-59 (1984). In addition, unless the trial court determines that no conflict exists, prejudice is presumed when defense counsel is forced to represent co-defendants despite having raised a timely objection. *Holloway v. Ark.*, 435 U.S. 475, 488-89 (1978). However, absent a timely objection, a conflict of interest claim premised on multiple representation of co-defendants requires a showing that an actual conflict adversely affected counsel's representation of a particular defendant

before

In *Lockhart v. Fretwell*, 506 U.S. 364, 372 (1993), the Supreme Court clarified that the prejudice prong of the test does not focus solely on mere outcome determination; rather, to establish prejudice, a criminal defendant must show that counsel's deficient representation rendered the result of the trial fundamentally unfair or unreliable.

the prejudice component will be presumed. *Cuyler v. Sullivan*, 446 U.S. 335, 348-50 (1980). The standard for evaluating a claim for post-conviction relief based on an attorney's alleged conflict of interest in situations other than those involving representation of multiple defendants remains unclear. In *Mickens v. Taylor*, 535 U.S. 162 (2002), the United States Supreme Court declined to decide whether the standard enunciated in *Cuyler* extends beyond the realm of multiple representation conflicts, concluding that the issue

presented "an open question." *Id.* at 176. The Eleventh Circuit has also refrained from clearly defining the boundaries of *Cuyler*'s application to attorney conflict of interest cases. *See, e.g.*, *Schwab v. Crosby*, 451 F.3d 1308, 1327 (11th Cir. 2006); *Quince v. Crosby*, 360 F.3d 1259, 1263 & n.4 (11th Cir. 2004). Likewise, this Court need not decide the question in this case, as Petitioner's claim fails under both *Strickland* and *Cuyler*.

B. The Cuyler Standard Applied

In order to establish that counsel's conflict of interest violated the Sixth Amendment, a petitioner must demonstrate both that an attorney labored under an actual conflict of interest and that such conflict adversely affected the attorney's representation of the client. *Cuyler*, 446 U.S. at 348. "[T]he possibility of conflict is insufficient to impugn a criminal conviction." *Id.* at 350. Further, a court will not find an actual conflict of interest unless the petitioner can "point to

specific instances in the record to suggest an actual conflict or impairment of [his] interest[]." *Smith v. White*, 815 F.2d 1401, 1404 (11th Cir. 1987) (internal quotations omitted). If the petitioner can make such a showing, the petitioner "need not demonstrate prejudice in order to obtain relief," *Cuyler*, 446 U.S. at 349-350, but only that "the conflict had some adverse effect on counsel's performance." *McConico v. State of Ala.*, 919 F.2d 1543, 1548 (11th Cir. 1990).

In this instance, the potential "actual conflict" arises from appointed counsel's demand for an outside fee from Petitioner, as well as counsel's subsequent failure to inform the Court that he was accepting private funds for legal services. Under section 2.02(f) of the Middle District of Florida's *Criminal Justice Act Plan*, which was adopted by the District pursuant to the requirements of the *Criminal Justice Act*, 18 U.S.C. § 3006A, "[u]nless permitted in advance by court order,

counsel appointed under the provisions of this Plan may not require, request, or accept any payment or promise of payment for representing a party." Further, under section 2.03 of the Plan, if appointed counsel learns that a client is financially able to make payment, "in whole or in part," for legal services, counsel "shall promptly advise the Court," unless the source of the attorney's information in this regard is protected as a privileged communication.

At a brief hearing on the issue, held prior to Petitioner's sentencing and in response to an *amicus* brief filed in this case, counsel fully admitted to accepting outside funds from Petitioner and failing to report receipt of those funds to the Court. Doc. 55 at 3. In fact, counsel admitted that he had never, in any other case in which he had served as court-appointed counsel, reported his receipt of private funds from a client. *Id.* at 2-3. The Court deems counsel's actions in this regard as clearly reprehensible and highly

unethical. However, an attorney's violation of ethical standards does not, by itself, establish ineffectiveness. *Nix v. Whiteside*, 475 U.S. 157, 165 (1986) ("A court must be careful not to narrow the wide range of conduct acceptable under the Sixth Amendment so restrictively as to constitutionalize particular standards of professional conduct"); *Kohler v. Kelly*, 890 F. Supp. 207, 215 (W.D.N.Y. 1994) ("A demand of payment by a court-appointed attorney does not reach the degree of grossly improper behavior needed to find per se ineffective assistance of counsel."). Therefore, the attorney's conduct must still be measured by the appropriate standard, whether it be *Strickland* or *Cuyler*.

In this instance, the Court finds that there was an actual conflict created by the attorney's demand for an additional fee from Petitioner. Certainly counsel was aware that Petitioner's financial situation did not allow him to retain a private attorney. In spite of this

knowledge, counsel demanded a large sum of money from Petitioner as purported supplemental compensation for legal services, and, according to Petitioner, indicated that the representation would suffer should Petitioner be unable to meet counsel's demands. While the record in this case does not reveal whether counsel actually threatened Petitioner, or whether Petitioner merely received the impression that counsel would not zealously represent him, the Court finds that counsel's interest in obtaining a $25,000 fee from a client who has been legally deemed indigent diverged from his interest in obtaining the best result for his client. The inquiry does not end here, however. *Cuyler* also requires Petitioner to show that the conflict adversely affected the representation.

Three elements must be satisfied for a petitioner to prove that an attorney's actual conflict of interest adversely affected the representation. *Freund v.*

Butterworth, 165 F.3d 839, 860 (11th Cir. 1999). First, the petitioner must show that counsel might have pursued an alternative defense strategy or tactic. *Id.* Second, the petitioner must show that the alternative strategy or tactic was "reasonable under the facts." *Id.* Finally, the petitioner must "show some link between the actual conflict and the decision to forgo the alternative strategy of defense." *Id.* In this regard, Petitioner contends that his attorney failed to object to certain allegedly improper assertions by the Government at trial. In particular, Petitioner argues that his attorney should have objected when the Government: (1) "[v]ouched for the credibility of its witnesses"; (2) "[c]haracterized [Petitioner] as a low to mid-level drug dealer"; (3) "[o]utlined its reasons for targeting [Petitioner] for investigation"; and (4) "[s]uggested their confidential informant was potentially in physical danger while in [Petitioner's] presence" (Doc. 1 at 4-5). All but one of the challenged

statements were made by the prosecution during opening or closing argument.

The Court finds that while Petitioner has identified specific instances in which he believes his attorney acted unreasonably, Petitioner has wholly failed to demonstrate part three of the test, i.e., that the attorney's decision to forgo objection was based on his conflicting desire to collect the $25,000 fee. In fact, Petitioner himself acknowledges the mere hypothetical nature of the conflict's effect on the representation when he asserts that his attorney's representation *could have been* compromised by the failure of Petitioner to live up to the fee agreement. *See* Doc. 1 at 7. In addition, Petitioner has failed to point to any facts in the record that even remotely indicate that counsel made a conscious choice to forgo certain objections because he had not been paid. On the contrary, Petitioner indicated that he was able to fulfill the majority of counsel's $25,000 demand by the time

the trial began, thus significantly lowering the chance that counsel's representation of Petitioner was influenced more by Petitioner's failure to pay the fee than by obtaining a favorable result for his client. Thus, regardless of whether the potential objections identified by Petitioner would have constituted reasonable alternative tactics, there is simply no evidence in the record to suggest that counsel's failure to pursue such alternatives was influenced by his interest in collecting the fee. Because Petitioner has failed to show that counsel's conflict of interest had an adverse effect on the representation, he cannot meet the more demanding *Strickland* requirement of demonstrating that his attorney's performance at trial was so deficient that it prejudiced the defense. Absent a showing of prejudice, Petitioner cannot prevail on his ineffective assistance of counsel claim. *Alvord v. Wainwright*, 725 F.2d 1282, 1289-90 (11th Cir. 1984) (holding that when no prejudice shown, there is no

need to address a claim that counsel was deficient), *cert. denied*, 469 U.S. 956 (1984).

Accordingly, it is hereby **ORDERED AND ADJUDGED**:

1. The motion to vacate, set aside, or correct an illegal sentence pursuant to 28 U.S.C. § 2255 (Doc. 1) filed by Michael Zone is **DENIED**, and this case is **DISMISSED** with prejudice.

2. The Clerk of the Court shall enter judgment accordingly and is directed to close this case. A certified copy of this Order and the judgment shall also be filed in criminal case number 6:06-cr-198-Orl-22KRS. 3. The Clerk of the Court is directed to terminate the § 2255 motion (Criminal Case Doc. 67) filed in criminal case number 6:06-cr-198-Orl-22KRS.

DONE and **ORDERED** in Chambers, Orlando, Florida on February 27, 2008.

S/ Anne C. Conway
ANNE C. CONWAY
United States District Judge

APPENDIX C

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

CASE NUMBER 6:07-cv-1331-Orl-22KRS
(6;06-cr-197-Orl-22KRS)

MICHAEL ZONE
Petitioner

v.

UNITED STATES OF AMERICA
Respondent

_____/

APPLICATION FOR CERTIFICATE OF APPEALABILITY

MICHAEL ZONE, the Petitioner in the above named case, hereby applies to this Court, pursuant to 28 U.S.C. 2253(c)(1)(b) for a certificate of appealability in the above styled action.

As grounds therefore, the Petitioner would show:

1. He applied for habeas corpus relief under 28 U.S.C. 2255. (Doc. 1) His petition involved issues surrounding his representation by his appointed trial counsel up to and through trial. The petition

separately argued Mr. Zone's appointed trial counsel's representation of Mr. Zone was deficient.

2. Although Mr. Zone requested an evidentiary hearing, no such hearing was held.

3. On February 27, 2008, this Court issued an order denying Mr. Zone's habeas corpus petition. (Doc. 7). While finding there was "an actual conflict" and characterizing Mr. Zone's trial counsel's conduct as "clearly reprehensible and highly unethical," the Court found Mr. Zone failed to demonstrate a connection between the reprehensible and highly unethical conduct and the deficiencies alleged in his counsel's performance at trial.

4. The Petitioner seeks a certificate of appealability for the following issues:

I) Whether the Court's finding of "an actual conflict" in this case (See Doc. 7, Order at page 6) in and of itself requires granting the 2255 motion. In

Mickens v. Taylor, 535 U.S. 162 (2002), the United States Supreme Court stated:

> We have used "actual conflict of interest" elsewhere to mean what was required to be shown in Sullivan. See United States v. Cronic, 466 U.S. 648, 662, n. 31, 104 S.Ct. 2039, 80 L.Ed.2d 657 (1984) ("[W]e have presumed prejudice when counsel labors under an actual conflict of interest .... See Cuyler v. Sullivan, 446 U.S. 335, 100 S.Ct. 1708, 64 L.Ed.2d 333 (1980)"). And we have used "conflict of interest" to mean a division of loyalties that affected counsel's performance. In Holloway, 435 U.S., at 482, 98 S.Ct. 1173, we described our earlier opinion in Glasser v. United States, 315 U.S. 60, 62 S.Ct. 457, 86 L.Ed. 680 (1942), as follows:
>
> > "The record disclosed that Stewart failed to cross-examine a Government witness whose testimony linked Glasser with the conspiracy and failed to object to the admission of arguably inadmissible evidence. This failure was viewed by the Court as a result of Stewart's desire to protect Kretske's interests, and was thus 'indicative of Stewart's struggle to serve two masters ....' [315 U.S.], at 75, 62 S.Ct. 457. After identifying this conflict of

> interests, the Court declined to inquire whether the prejudice flowing from it was harmless and instead ordered Glasser's conviction reversed." (Emphasis added.)
>
> Thus, the Sullivan standard is not properly read as requiring inquiry into actual conflict as something separate and apart from adverse effect. An "actual conflict," for Sixth Amendment purposes, is a conflict of interest that adversely affects counsel's performance."

Id at 535 U.S. 172. Based on the trial court's finding there was "an actual conflict," prejudice is presumed and the Defendant is entitled to relief under 2255.

II) Whether the Petitioner was entitled to an evidentiary hearing on the issues raised in his motion. More specifically, whether the Petitioner should have been able to conduct an examination of Mr. Zone's trial counsel regarding the reasons for his decisions at trial and whether they were influenced by the fee

discussions. Trial counsel failed to object when the Government:

a) Vouched for the credibility of its witnesses (Doc. 56, Page 53, 73)

b) Characterized the Defendant as a low to mid-level drug dealer. (Doc.57, page 66, 88).

c) Outlined its reasons for targeting Mr. Zone for investigation (i.e. his past drug dealings) . (Doc. 56, page 52)

d) Suggested their confidential informant was potentially in physical danger while in Mr. Zone's presence. (Doc. 56, page 58).

Additionally, trial counsel did not file a motion for new trial. The Petitioner also would argue he was entitled to ask about these issues both in terms of their general relevancy to the competency of trial counsel as well as to ask about these issues as they relate to the financial misconduct trial counsel engaged in with respect to the Petitioner. The Petitioner is entitled to a

hearing unless the files and the records of the case conclusively show that the prisoner is entitled to no relief. *See, e.g., Fontaine v. United States, 411 U.S. 213 (1973)*

III. Whether the Petitioner was required to show a nexus between inadequacies in his performance at trial and his "clearly reprehensible and highly unethical conduct" towards his client. It is the Petitioner's position there are essentially three (3) issues emanating out of this case. First, the issue of whether Mr. Zone's trial counsel's "clearly reprehensible and highly unethical" conduct towards Mr. Zone is in and of itself sufficient cause to grant relief. Second, the issue of whether the failure to make the objections at trial complained of in the 2255 motion form a basis for relief under that statute independent of any conflict. Third, whether there is (or has to be) a nexus between the unethical conduct of trial counsel and the failure to make objections at trial. This third

issue especially merits further examination by the Courts. In the instant case, the errors complained of in trial counsel's performance are errors of omission (i.e., trial counsel failed to object to certain comments, failed to file a motion for new trial, etc.). It is the Petitioner's position these failures, whether they were the result of a conflict of interest or sheer incompetence, merit relief under 2255.

5. In *Barefoot v. Estelle, 463 U.S. 880, 893, 103 S.Ct. 3383, 3394, 77 L.Ed.2d 1090 (1983))*, United States Supreme Court noted the following statement "cogently sums up this standard";

> "In requiring a 'question of some substance', or a 'substantial showing of the denial of [a] federal right', obviously the petitioner need not show that he should prevail on the merits. He has already failed in that endeavor. Rather, he must demonstrate that the issues are debatable among jurists of reason; that a court could resolve the issues [in a different manner]; or that the questions are 'adequate to deserve encouragement to proceed further.' "

Id., n. 4. The issues outlined above by the Petitioner are questions of substance that go to the heart of the appropriate relationship between an attorney and his or her client. The law is unresolved as it relates to the analysis of these issues as noted by the United States Supreme Court in *Mickens v. Taylor, 535 U.S. 162, 15 176 (2002)(commenting on the "open question[s]" remaining in the application of the holding in Cuyler v. Sullivan, 446 U.S. 335, 100 S.Ct. 1708, 64 L.Ed.2d 333 (1980))*.

WHEREFORE, the Petitioner prays this Honorable Court certify the above described issues as appealable to the Eleventh Circuit

RESPECTFULLY SUBMITTED

S/Robert Berry
ROBERT R. BERRY, ESQ.
Florida Bar No.: 714216
GREGORY W. EISENMENGER, ESQ.
Florida Bar No.: 237175

APPENDIX D

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

CASE NO. 6:07-cv-1331-Orl-22KRS
(6:06-cr-Orl-22KRS)

MICHAEL ZONE,
Petitioner,

Vs.

UNITED STATES OF AMERICA,
Respondent.
_____/

ORDER

This case is before the Court on the following motion:

MOTION: Petitioner's Application for Certificate of

Appealability (Doc. No. 10, filed March 10, 2008).

See Edwards v. United States, 114 F.3d 1083, 1084 (11th Cir. 1997). This Court should grant an application for certificate of appealability only if Petitioner makes "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). Petitioner has failed to make a substantial showing of the denial of a constitutional right, and the request for a certificate of appealability must be **DENIED**.

DONE AND ORDERED at Orlando, Florida,

this 19th day of March, 2008.

S/ Anne C. Conway
ANNE C. CONWAY
United States District Judge

Copies to:
Sc 3/19
Counsel of Record

APPENDIX E

UNITED STATES COURT OF APPEALS
ELEVENTH CIRCUIT

11TH Cir. Case No: 08-11124-E
Florida MD No: 6:07-cv-1331-Orl-22KRS
(6:06-cr-197-Orl-22KRS)

MICHAEL ZONE

Appellant

v.

UNITED STATES OF AMERICA

Appellee

_____/

APPELLANT'S APPLICATION FOR CERTIFICATE OF APPEALABILITY

MICHAEL ZONE, the Petitioner in the above named case, hereby applies to this Court, pursuant to 28 U.S.C. 2253(c)(1)(b) for a certificate of appealability in the above styled action.

A. CERTIFICATE OF INTERESTED PERSONS

Berry, Robert R, Petitioner's counsel

Conway, Anne C., District Court Judge

Eckhart, Daniel W., Counsel for the Government

Eisenmenger, Gregory W., Petitioner's co-counsel

Handlin III, Charles, prior criminal trial counsel for Michael Zone

Ronca, Peggy Morris, Assistant United States Attorney, lead appellate counsel

Zone, Michael, Petitioner.

B. MOTION AND ARGUMENT

As grounds for the request for certificate of appealability, the Petitioner would show[3]:

1. Mr. Zone was convicted in the Middle District of Florida in case number 6:06-cr-197-Orl-22KRS and was sentenced to life in prison, and sought relief under 28 U.S.C. 2255.

2. On October 25, 2006, the Defendant was indicted on a charge of possession with intent to distribute and distribute 50 grams or more of cocaine base.

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[3] For purposes of clarity the original criminal prosecution 06-00198-CR-ORL-22KRS will be referred to as "criminal case" where there are citations to the record, and the 2255 petition 07-01331-CV-ORL-22KRS will be referred to as "2255 case."

3. On November 8, 2006, the Defendant was arrested on this indictment.

4. On November 8, 2006, the Defendant was found to be indigent and was appointed a federal public defender.

5. On December 4, 2006, the public defender's office was withdrawn as counsel for the Defendant.

6. On December 4, 2006, the Court appointed attorney Charles L. Handlin III as counsel for the Defendant.

7. Thereafter, attorney Handlin solicited funds from the Defendant and friends to pay for his services. Mr. Handlin led Mr. Zone to believe the quality of his representation would suffer because the Court does not adequately remunerate appointed attorneys for their work. Based on this, and his fear of an inadequate defense against very serious charges, Mr. Zone set about attempting to meet Mr. Handlin's financial demands.

8. The Middle District of Florida has specific instructions and requirements with regard to payment of appointed counsel. The "Instructions for Completion of the CJA Form 20 Appointment of and Authority to Pay Court Appointed Counsel" states, at page 2, "[n]o appointed attorney shall accept a payment from or on behalf of the person represented without authorization by a United States district or circuit judge or magistrate on a CJA Form 7, Order Terminating Appointment of Counsel and/or Authorization for Distribution of Available Private Funds..."

9. Mr. Handlin accepted a 2001 Jaguar Automobile from Mitzi Canard, a friend of the Defendant, as partial payment for a fee for his representation of Mr. Zone on or about December 19, 2006, and also accepted $150.00 from Mr. Zone towards what apparently was to be a $25,000.00 fee for legal representation on or about January 4, 2007.

10. Prior to accepting these payments, Mr. Handlin did not seek authorization from the Court as is required by local rule, and no order terminating his appointment as counsel was issued. Counsel verified this by having his office contact Joan Calcutt at the Federal Courthouse in Orlando. It was also verified by a review of the clerk's on-line docket in this case. It appears from the record in this case Mr. Handlin never informed the Court of his receipt of legal fees in this case until the undersigned advised the Court of the situation. Mr. Handlin has since admitted he failed to follow the procedures outlined above.

11. A review of the vehicle registration records showed Mr. Handlin, and Jane Culver Handlin, are the owners and registrants of the 2001 Jaguar formerly belonging to Ms. Canard.

12. Mr. Handlin falsely represented himself to the court and the jury at the beginning of Mr. Zone's trial as "appointed counsel." (criminal case Doc. 56,

page 6). By maintaining this ruse, the trial Court would not become aware of Mr. Handlin's other, improper, financial arrangements regarding the Defendant. Mr. Zone was convicted at trial. The trial centered on an alleged sale of cocaine by Mr. Zone to a confidential source. There was no recording of this alleged transaction. Mr. Zone presented alibi witnesses to testify he was somewhere else at the time of the alleged transaction.

13. On April 5, 2007, the undersigned filed a document titled "Amicus Filing on Behalf of Defendant Michael Zone. (criminal case Doc. 48).

14. On April 11, 2007, the trial court ordered Mr. Handlin discharged as counsel for the Defendant. (criminal case Doc. 54, page 3).

15. In reviewing the trial transcript in this case, Mr. Handlin failed to object when the Government:

a) Vouched for the credibility of its witnesses (criminal case Doc. 56, Page 53, 73)

b) Characterized the Defendant as a low to mid-level drug dealer. (criminal case Doc.57, page 66, 88).

c) Outlined its reasons for targeting Mr. Zone for investigation (i.e. his past drug dealings)[4]. (criminal case Doc. 56, page 52)

d) Suggested their confidential informant was potentially in physical danger while in Mr. Zone's presence. (criminal case Doc. 56, page 58).

Attorney Handlin did not object to these assertions by the Government.

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[4] For the Government to have lawfully attempted to present this type of evidence compliance with Federal Rule of Evidence 404 is required. That 404(b) states:
"(b) Other Crimes, Wrongs, or Acts.--Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident, provided that upon request by the accused, the prosecution in a criminal case shall provide reasonable notice in advance of trial, or during trial if the court excuses pretrial notice on good cause shown, of the general nature of any such evidence it intends to introduce at trial."

16. It was the Defendant's position in his 2255 motion he is entitled to a new trial based on Mr. Handlin's financial dealings with Mr. Zone. It was further Mr. Zone's position he was entitled to a new trial based on the un-objected to comments outlined in paragraph 15.

17. Zone filed a motion for post-conviction relief challenging the judgment and sentence entered against the Defendant on August 23, 2007 in the Middle District of Florida, Orlando Division.

18. The Defendant did not appeal the judgment and sentence, but instead filed his motion for post-conviction relief immediately after his sentence was entered. The reasons for this decision are as follows:

a) The trial attorney, Charles Handlin, did not file a timely motion for new trial, and therefore no issues were preserved for appellate review.

b) The trial attorney, Charles Handlin, did not object to issues discussed later in this motion, and therefore did not preserve them for appellate review.

c) The undersigned filed a motion for new trial addressing the issue of whether the Defendant had conflict free counsel at trial based on the improper financial dealings of his attorney, Charles Handlin III. Judge Conway denied the motion as untimely finding it a) was not filed within seven (7) days of the verdict as required by Fed. R. Crim. P. 33 and b) the motion was not based on "newly discovered evidence" as contemplated by that rule, and therefore was not exempt from the seven day requirement. The Court indicated the appropriate avenue to litigate this issue was 28 U.S.C. 2255.[5] The Defendant was sufficiently confident in Judge Conway's analysis of Rule 33 that

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[5] Oddly, in her order denying 2255 relief, Judge Conway questioned why Mr. Zone chose to pursue 2255 relief before taking his case through the normal appellate channels. (See 2255 case Doc 7 at page 2 fn.2). It was Judge Conway herself who stated 2255 relief was the proper avenue. (See criminal case, Doc. 63, pages 6-7).

he chooses not to litigate whether the issues outlined below could be addressed via a motion for new trial filed outside the seven day period. Judicial economy and the Defendant's desire to resolve this matter lead him to 28 U.S.C. 2255 as the most efficient way to address the issues he wishes to litigate.

19. Although Mr. Zone requested an evidentiary hearing, no such hearing was held.

20. On February 27, 2008, the trial court issued an order denying Mr. Zone's habeas corpus petition. (2255 case Doc. 7). While finding there was "an actual conflict" and characterizing Mr. Zone's trial counsel's conduct as "clearly reprehensible and highly unethical," the Court found Mr. Zone failed to demonstrate a connection between the reprehensible and highly unethical conduct and the deficiencies alleged in his counsel's performance at trial.

21. The Petitioner seeks a certificate of appealability for the following issues:

I) Whether the Court's finding of "an actual conflict" in this case (See 2255 case Doc. 7, Order at page 6) in and of itself requires granting the 2255 motion. In *Mickens v. Taylor, 535 U.S. 162 (2002)*, the United States Supreme Court stated:

> We have used "actual conflict of interest" elsewhere to mean what was required to be shown in Sullivan. See United States v. Cronic, 466 U.S. 648, 662, n. 31, 104 S.Ct. 2039, 80 L.Ed.2d 657 (1984) ("[W]e have presumed prejudice when counsel labors under an actual conflict of interest .... See Cuyler v. Sullivan, 446 U.S. 335, 100 S.Ct. 1708, 64 L.Ed.2d 333 (1980)"). And we have used "conflict of interest" to mean a division of loyalties that affected counsel's performance. In Holloway, 435 U.S., at 482, 98 S.Ct. 1173, we described our earlier opinion in Glasser v. United States, 315 U.S. 60, 62 S.Ct. 457, 86 L.Ed. 680 (1942), as follows:
>
> > "The record disclosed that Stewart failed to cross-examine a Government witness whose testimony linked Glasser with the conspiracy and failed to object to the admission of arguably inadmissible evidence. This failure was viewed by the Court as a result of Stewart's desire to

> protect Kretske's interests, and was thus 'indicative of Stewart's struggle to serve two masters ....' [315 U.S.], at 75, 62 S.Ct. 457. After identifying this conflict of interests, the Court declined to inquire whether the prejudice flowing from it was harmless and instead ordered Glasser's conviction reversed." (Emphasis added.)
>
> Thus, the Sullivan standard is not properly read as requiring inquiry into actual conflict as something separate and apart from adverse effect. An "actual conflict," for Sixth Amendment purposes, is a conflict of interest that adversely affects counsel's performance."

Id at 535 U.S. 172. Based on the trial court's finding there was "an actual conflict," prejudice is presumed and the Defendant is entitled to relief under 2255.

II) Whether the Petitioner was entitled to an evidentiary hearing on the issues raised in his motion. More specifically, whether the Petitioner should have

been able to conduct an examination of Mr. Zone's trial counsel regarding the reasons for his decisions at trial and whether they were influenced by the fee discussions. Judge Conway found Mr. Zone had not shown a nexus between the monetary issue and the quality or lack thereof of Mr. Handlin's trial performance. The only way to establish such a nexus would be to confront Mr. Handlin and examine him under oath about these issues. The trial court, as fact finder, could then weigh Mr. Handlin's credibility on these issues. As indicated earlier, Mr. Handlin failed to object when the Government:

a) Vouched for the credibility of its witnesses (criminal case Doc. 56, Page 53, 73)

b) Characterized the Defendant as a low to mid-level drug dealer. (criminal case Doc.57, page 66, 88).

c) Outlined its reasons for targeting Mr. Zone for investigation (i.e. his past drug dealings) . (criminal case Doc. 56, page 52)

d) Suggested their confidential informant was potentially in physical danger while in Mr. Zone's presence. (criminal case Doc. 56, page 58).

Additionally, trial counsel did not file a motion for new trial. The Petitioner also would argue he was entitled to ask about these issues both in terms of their general relevancy to the competency of trial counsel as well as to ask about these issues as they relate to the financial misconduct trial counsel engaged in with respect to the Petitioner. The Petitioner is entitled to a hearing unless the files and the records of the case conclusively show that the prisoner is entitled to no relief. *See, e.g., Fontaine v. United States, 411 U.S. 213 (1973)*

III. Whether the Petitioner was required to show a nexus between inadequacies in his performance at trial and his "clearly reprehensible and highly unethical conduct" towards his client. It is the Petitioner's position there are essentially three (3)

issues emanating out of this case. First, the issue of whether Mr. Zone's trial counsel's "clearly reprehensible and highly unethical" conduct towards Mr. Zone is in and of itself sufficient cause to grant relief. Second, the issue of whether the failure to make the objections at trial complained of in the 2255 motion form a basis for relief under that statute independent of any conflict. Third, whether there is (or has to be) a nexus between the unethical conduct of trial counsel and the failure to make objections at trial. This third issue especially merits further examination by the Courts. In the instant case, the errors complained of in trial counsel's performance are errors of omission (i.e., trial counsel failed to object to certain comments, failed to file a motion for new trial, etc.). It is the Petitioner's position these failures, whether they were the result of a conflict of interest or sheer incompetence, merit relief under 2255.

22. In *Barefoot v. Estelle, 463 U.S. 880, 893, 103 S.Ct. 3383, 3394, 77 L.Ed.2d 1090 (1983))*, United States Supreme Court noted the following statement "cogently sums up this standard";

> "In requiring a 'question of some substance', or a 'substantial showing of the denial of [a] federal right', obviously the petitioner need not show that he should prevail on the merits. He has already failed in that endeavor. Rather, he must demonstrate that the issues are debatable among jurists of reason; that a court could resolve the issues [in a different manner]; or that the questions are 'adequate to deserve encouragement to proceed further.' "

Id., n. 4. The issues outlined above by the Petitioner are questions of substance that go to the heart of the appropriate relationship between an attorney and his or her client. The law is unresolved as it relates to the analysis of these issues as noted by the United States Supreme Court in *Mickens v. Taylor, 535 U.S. 162, 15 176 (2002)(commenting on the "open question[s]" remaining in the application of the holding in Cuyler v.*

Sullivan, 446 U.S. 335, 100 S.Ct. 1708, 64 L.Ed.2d 333 (1980)). Under the lower court's interpretation of the current status of the law, if Mr. Zone's trial counsel had been having an affair with Mr. Zone's wife (hypothetically, as Mr. Zone is unmarried), and lost his case at trial, Mr. Zone would have no remedy unless he could show, without the benefit of an evidentiary hearing, that his attorney's decision making process at trial was affected by his conduct with Mr. Zone's wife. Dickens' Mr. Bumble would most certainly be amused.

WHEREFORE, the Petitioner prays this Honorable Court certify the above described issues as appealable.

RESPECTFULLY SUBMITTED

/s/ Robert R. Berry
ROBERT R. BERRY, ESQ.
Florida Bar No.: 714216

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a correct and true copy of the foregoing has been sent via overnight mail to Peggy Morris Ronca, Assistant United States Attorney, 501 West Church Street, Suite 300, Orlando, Florida 32805 on this 8th day of April, 2008.

EISENMENGER, BERRY & PETERS, P.A.

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APPENDIX F

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT
NO. 08-11124-E

6:07-cv1331
6:06-cr198

DATED MAY 14, 2008

MICHAEL ZONE,

Versus

UNITED STATES OF AMERICA,

Appeal from the United States District Court for the Middle District of Florida

ORDER:

Appellant's motion for certificate of appealability is DENIED because appellant has failed to make a substantial showing of the denial of a constitutional right. 28 U.S.C. § 2253 (c) (2).

/s/ William H. Pryor, Jr.
UNITED STATES CIRCUIT JUDGE